[Cite as *Broadvox, L.L.C., v. Oreste*, 2009-Ohio-3466.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92064

BROADVOX, LLC

PLAINTIFF-APPELLEE

vs.

LENS ORESTE, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-609615

BEFORE: Blackmon, P.J., Stewart, J., and Celebrezze, J.

RELEASED: July 16, 2009

JOURNALIZED:

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PATRICIA ANN BLACKMON, P.J.:

{¶ 1} Appellant Karl Oreste appeals the trial court's denial of his motion to vacate a default judgment.[1] He assigns the following error for our review:

> **"I. The trial court erred by refusing to grant Karl Oreste's amended motion to vacate judgment and/or relief from judgment."**

{¶ 2} Having reviewed the record and pertinent law, we affirm the trial court's decision. The apposite facts follow.

FACTS

{¶ 3} KMC Global Telecom, L.L.C. ("KMC"), located in Miami, Florida, was allegedly in the business of selling public telecommunications services. On October 16, 2006, Lens Oreste, on behalf of KMC, entered into a Carrier Enhanced VoIP Service Agreement with Broadvox, L.L.C. ("Broadvox"), located in Cleveland, Ohio. KMC failed to pay for the services provided by Broadvox; therefore, Broadvox initiated collection proceedings in the amount of $46,396.61 plus interest. Broadvox discovered that KMC was not organized pursuant to Florida law, but was a Florida-charter company, which according to Broadvox made the officers of the company personally liable for the debt.

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[1]The complaint was also filed against Lens Oreste, Clainth Ficien, KMC Global Telecom, L.L.C., and Blulines Telecom, L.L.C. However, Karl Oreste was the only party to file the motion for relief from judgment that is the subject of the instant appeal.

{¶ 4} On December 6, 2006, Broadvox filed its action alleging claims for breach of contract, unjust enrichment, promissory estoppel, fraud, negligent representation, conversion, and conspiracy. The complaint alleged that the defendants worked together to defraud Broadvox of $46,396.61 in telecommunications services that Broadvox provided to them pursuant to the contract. The complaint also prayed for interest in the contractual rate of 1.5 percent per month, plus punitive damages in the amount of $150,000.

{¶ 5} A copy of the complaint was served on Karl Oreste, KMC, and Blulines by certified mail. Lens Oreste's complaint was returned as unclaimed. After a certified service processor in Florida confirmed Lens Oreste's last known address, the complaint was sent by ordinary mail and was not returned. Broadvox was unable to obtain service on Clainth Ficien; thus, he was eventually dismissed from the case without prejudice.

{¶ 6} Broadvox moved for default judgment on March 28, 2007 because none of the served parties responded to the complaint. On May 4, 2007, the trial court granted default judgment in favor of Broadvox in the amount of $46,396.61, plus $4,130.08 in interest, and $150,000 in punitive damages.

{¶ 7} On September 7, 2007, Karl Oreste's Florida attorney filed a motion for admission pro hac vice, along with a motion to vacate judgment. The trial court denied the motions on October 12, 2007 because Oreste's attorney's motion

for pro hac vice was invalid; he failed to associate with local counsel as required by the Ohio Rules of Professional Conduct.

{¶ 8} On June 11, 2008, Karl Oreste filed an amended motion to vacate judgment via local counsel. He argued, as he did in the first motion, that he did not learn of the lawsuit until the judgment was domesticated in Florida and pointed out that he did not sign the certified receipt cards, which were signed by "other" persons. He maintained his only connection to the suit was that Lens Oreste was his son; he also denied that he was the Chairman of KMC.

{¶ 9} On July 31, 2008, Broadvox opposed the motion, arguing that Oreste's motion to vacate judgment was untimely because it was filed more than one year after the default judgment was entered and also argued personal jurisdiction was obtained over Oreste by virtue of the choice of law provision in the contract. Additionally, Broadvox argued that Oreste was served by certified mail both at his home and business addresses. The trial court denied Oreste's motion to vacate judgment.

Denial of Motion to Vacate

{¶ 10} Oreste argues that the trial court abused its discretion by failing to vacate the default judgment because the trial court lacked personal jurisdiction over him due to ineffective service. Specifically, he argues that although the record indicates that a complaint was successfully served by certified mail both

at his home address and business address, someone else signed for the mail and failed to deliver the complaint to him.

{¶ 11} Trial courts have inherent authority to vacate a void judgment; thus a party who asserts a lack of jurisdiction by improper service does not need to meet the requirements of Civ.R. 60(B).[2] The party is only required to show that service was invalid.[3] This court reviews the trial court's decision regarding the validity of service for an abuse of discretion.[4]

{¶ 12} For a court to acquire personal jurisdiction over a party there must be proper service of a summons and complaint, or the party must have entered an appearance, affirmatively waived service, or otherwise voluntarily submitted to the court's jurisdiction.[5] A default judgment rendered by a court without obtaining service over the defendant is void, and the party is entitled to vacation of the judgment.[6]

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[2]*Patton v. Diemer* (1988), 35 Ohio St.3d 68, paragraph four of the syllabus; *Deutsche Bank Trust Co. Americas v. Pearlman*, 162 Ohio App.3d 164, 2005-Ohio-3545, at ¶14.

[3]Id.

[4]Id.

[5]*Money Tree Loan Co. v. Williams*, 169 Ohio App.3d 336, 2006-Ohio-5568, at ¶18; *Patterson v. Patterson*, Cuyahoga App. No. 86282, 2005-Ohio-5352, ¶12, citing *Maryhew v. Yova* (1984), 11 Ohio St.3d 154, 156-157.

[6]*State ex rel. Ballard v. O'Donnell* (1990), 50 Ohio St.3d 182, syllabus.

{¶ 13} The preferred method for serving a party in the State of Ohio is by certified mail, which is evidenced by a signed return receipt.[7] Individuals must be served at their "usual place of residence," and any person residing at that address who is of "suitable age and discretion" may receive such service.[8] The Ohio Supreme Court has clarified that the addressee's failure to sign the receipt does not invalidate service as long as another person of adult age signs the card acknowledging receipt.[9]

{¶ 14} In this case, the record contains signed certified receipt cards addressed to Oreste's residence and business address at KMC. The cards were signed by a different person at each place. Oreste argues, however, that compliance with Civ.R. 4 only creates a rebuttable presumption that service was completed and that his affidavit in which he alleges he did not receive the complaint rebuts the presumption. However, Oreste's affidavit does not rebut the presumption of service. Oreste did not state in his affidavit that the addresses were invalid or that the receipts were not signed by a competent adult. Instead, he stated that he did not receive notice of the complaint because the

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[7]See Civ.R. 4.1(A); see, also, *Mitchell v. Mitchell* (1980), 64 Ohio St.2d 49.

[8]Civ.R. 4.1(A).

[9]*Mitchell v. Mitchell*, supra. See, also, *Michael D. Tully, Co., L.P.A. v. Dollney* (1987), 42 Ohio App.3d 138, 140; *Fancher v. Fancher* (1982), 8 Ohio App.3d 79, 81.

two different people who signed for the certified mail failed to forward the complaint to him.

{¶ 15} This is not a cognizable defense. There is a distinction between service and actual notice.[10] Valid service exists when the civil rules for obtaining service have been fulfilled.[11] Because the certified mail was claimed at both Oreste's home and business addresses, service was complete; thus, Oreste was properly served. As a result, based on our analysis, Oreste's reliance on *Rafalski v. Oates*[12] and its progeny for the principle that service can be rebutted is not relevant.

{¶ 16} The argument that he did not receive actual notice of the complaint is not jurisdictional; therefore, it would be properly brought pursuant to Civ.R. 60(B).

{¶ 17} We review the trial court's Civ.R. 60(B) ruling for an abuse of discretion.[13] In order to prevail on a Civ.R. 60(B) motion to vacate judgment, the movant must establish that "(1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the

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[10]*Claims Mgmt. Serv's. v. Tate* (Sept. 29, 2000), 1st Dist. No. C-000034; *Finnerty v. Achenback* (Feb. 11, 1988), 10th Dist. No. 87AP-937.

[11]Id.

[12](1984), 17 Ohio App.3d 65.

[13]*Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 20.

grounds stated in Civ.R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time, and, where the grounds of relief are Civ.R. 60(B)(1), (2) or (3), not more than one year after the judgment, order or proceeding was entered or taken."[14] If any of these three requirements is not met, the motion should be overruled.[15]

{¶ 18} In the instant case, the issue is the timeliness of Oreste's motion. He claims he did not receive notice until the judgment was transferred to Florida and also notes that the judgment was not final until December 31, 2007, when Ficien was dismissed from the case. We agree that a party can only seek relief from a final judgment[16] and that the judgment was not final until Ficien was dismissed from the case. However, we conclude that his motion to vacate was not timely even if we start the time from the final judgment.

{¶ 19} The judgment became final on December 31, 2007; Oreste obviously had prior notice of the action and default judgment because his attorney filed the invalid motion to vacate on September 7, 2007. When the default judgment became final on December 31, 2007, Oreste did not refile the motion to vacate

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[14]*GTE Automatic Electric, Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, paragraph two of the syllabus.

[15]*Svoboda v. Brunswick* (1983), 6 Ohio St.3d 348, 351.

[16]See *Busa v. Lasorella* (May 4, 1995), Cuyahoga App. No. 67980, citing *Jarrett v. Dayton Osteopathic Hosp., Inc.* (1985), 20 Ohio St.3d 77, 78.

until June 11, 2008, six months later. Thus, in spite of his having actual notice, he waited six months to file a valid motion to vacate judgment. We conclude that given our prior precedent in which we held that lesser periods of time were unreasonable to move to vacate a default judgment, certainly waiting six months was unreasonable.[17]

{¶ 20} Oreste also argues the trial court did not have long-arm jurisdiction over him because he did not have any contacts with Ohio. However, because we have concluded that Oreste was properly served with the complaint, his failure to raise the argument regarding personal jurisdiction in a responsive pleading, waives this argument.[18] Accordingly, Oreste's assigned error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed. The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Common Pleas Court to carry this judgment into execution.

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[17]*Fed. Nat'l Assoc. v. Goldstein*, Cuyahoga App. No. 87743, 2006-Ohio-6789 (five-and-one-half-months after judgment was unreasonable); *Larson v. Umoh* (1986), 33 Ohio App.3d 14, 17 (motion filed 72 months after judgment was unreasonable); *Mt. Olive Baptist Church v. Pipkins Paints and Home Improv.* (1979), 64 Ohio App.2d 285, 289 (motion filed four months after judgment was unreasonable); *Zerovnik v. E.F. Hutton & Co.* (June 7, 1984), Cuyahoga App. No. 47460 (motion filed two-and-one-half months after judgment was unreasonable).

[18]*Fitworks Holding L.L.C. v. Sciranko*, Cuyahoga App. No. 90593, 2008-Ohio-

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure..

PATRICIA ANN BLACKMON, PRESIDING JUDGE

MELODY J. STEWART, J., and
FRANK D. CELEBREZZE, JR., J., CONCUR

4861 (because the defendant failed to file an answer, he waived his defense).